

BOOK REVIEWS

National Prohibition. By Arthur W. Blakemore. Albany, N. Y., Matthew Bender and Company, 1923. pp. lx, 787.

"In all matters having to do with the personal habits and customs of large numbers of our people we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought to be accomplished by great reforms of this character be made satisfactory and permanent."

So wrote Woodrow Wilson in vetoing the present National Prohibition Act, returning the bill to a Congress which promptly passed it over his veto. Mr. Blakemore, in a preface, describes the act as "probably as fair a law as could be drafted to enforce the Eighteenth Amendment." His work cites approximately thirteen hundred decisions, the author critically examining the various theories supporting them. And out of it all one is led to agree both with Mr. Wilson's premise and Mr. Blakemore's conclusion. It has weathered the fiercest legal tempest unharmed and sound, and, perhaps more significant, the fury of the indignation it has aroused has revealed only one vulnerable point in its frame, the definition of an intoxicating beverage as one containing one-half of one per centum or more of alcohol by volume.

This is the more remarkable if we consider the act as pioneer legislation, the first attempt of the federal government to police the individual citizen for his personal rather than his economic welfare. Here then was the richest legal area still unexplored by scholars, containing every description of question, and previously travelled only by those in search of some particular point. The Department of Justice and hurried annotators had previously collected the more important decisions pertinent to the several sections and paragraphs. The present volume is primarily an exhaustive annotation of the federal law, incidentally a comparison of the state statutes and decisions, and as a corollary, an analysis of the whole field. Subsequent editions keeping it up to date, the author need anticipate no immediate rival in his work. He has covered the ground.

This does not mean, however, that Blakemore on Prohibition is a Wigmore on Evidence. He has harrowed in spots where mincing is necessary. It should be obvious that from a legal point of view prohibition enforcement chiefly consists in reconciling the Eighteenth Amendment with the Fourth and Fifth. Where shall we draw the line between our conflicting constitutional mandates prohibiting liquor on the one hand and protecting us in our persons and property on the other? "Practically all possible questions in relation to the Act have been already definitely settled by our highest court," declares Mr. Blakemore. The advance sheets of the Federal Reporter seem to contradict him with innumerable cases under "Intoxicating Liquors." Indeed, this question of search and seizure is in a most aggravated state at present. One lawyer in twenty seems to appreciate that search warrants under the Act are entirely governed in their requisites by the terms of the Act of June 15, 1917, Ch. 30, Title XI (40 Stat. at L. 217, 228). As a result, the courts have only recently considered the restrictions thus imposed, with an amazing variety of interpretations. Mr. Blakemore prints the requirements with such decisions as he could find, but offers no comment. And in case this criticism may seem captious, may we ask whether sections 12 to 17 are mandatory or "merely ministerial" regulations? (See *United States v. Kaplan* [1923, S. D. Ga.] 286 Fed. 963.) Upon the answer to the question depends the validity of nearly half the warrants executed.

This is by way of example. Take Section 25 of the Act. "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel, or

boarding house." This most ambiguous phraseology receives scant attention from Mr. Blakemore, although one of the three most important sentences in the act. The courts have either rendered diametrically opposed decisions of its proper interpretation or, with some dexterity, dodged the issue. The obvious flaw in the wording of the statute is that its author has put everything into his major premise that he desires to draw from it. For instance, if a "private dwelling" is used for the "sale of intoxicating liquor," is it not used as a "shop," "store," "saloon," or at least "in part used for some business purpose"? If so, why are the two parts of the sentence joined with an "or"? The practical question involved is a "private" residence in part used for some business purpose? The next door neighbor of a "soft drink place" (new name for saloon) manufactures moonshine whiskey in wash boilers in his kitchen, and supplying the place next door, shares the profits of the saloonkeeper. The smell of fermenting mash, the crude stills seen through the window, are facts recited in an affidavit; the proximity to the saloon is noted. Does the affidavit recite facts sufficient to establish probable cause for the issuance of a search warrant? In nine districts out of ten the answer depends on who is the district judge; in the tenth district the circuit court has passed on the question. No help can be derived from Mr. Blakemore.

The remaining questions still unsettled are many. Search warrants for automobiles, the return of liquor unlawfully seized, the proper description of premises; these Mr. Blakemore handles well, in particular the second. When he considers the decisions on the constitutionality of making possession alone a crime, he merely lifts sections of them which in fact conflict and draws a weak conclusion. When in doubt he quotes (what lawyer does not?); but he should refrain from dogma on his doubtful points. The accuracy of his statement that "there can be no reasonable doubt of the validity of the prohibition on possession" depends entirely on the facts of the case raising the question.

Law, however, is not divided into water-tight bulkheads, and "prohibition" includes a great deal of criminal, constitutional and international law. Mr. Blakemore has stuck to his subject, probably the hardest task he had. He simplified it by annotating the federal statute; he pretends and accomplishes little else.

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[This review was found among the papers of Mr. Depew after his death. It is thought, but is not definitely known, that the form in which it is here published was intended by him as final.—ED.]

The Constitution of the German Republic. By Heinrich Oppenheimer. London, Stevens and Sons, Ltd., 1923. pp. viii, 260.

The German constitution of 1919 is still an infant and may never survive to maturity. Americans know how slowly and steadily a written constitution grows and how it never ceases to grow. But even an infant constitution "acquires traits" in the course of a few years. With these acquired characteristics Mr. Oppenheimer (of the Middle Temple, Barrister at Law) does not deal. Most of his volume might have been written as the Weimar convention closed its doors and its members departed for home, except that he would have lacked the assistance of German legal commentators upon it.

It is a meticulous, German-like, legalistic analysis of the phrases of the constitution—the sort of thing that an able and well read American college student would be able to do for himself with the text of the Constitution in hand. There is no flesh and blood to it. There is little or no description of how the naked skeleton has been articulating in action. It is more sympathetic and fair-minded than Brunet's analysis made in 1922; but it is also by no means so penetrating.

If one is interested in the study of going constitutions as non-going concerns, this is a book that will interest. It is a book—well, yes, perhaps that statement describes it sufficiently, even though its bibliography contains no reference to English or French treatises and an index has been regarded as superfluous—which may or may not show sound judgment.

HOWARD LEE MCBAIN

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The American Judge. By Andrew A. Bruce. New York, The Macmillan Company, 1923. pp. 218.

This little volume, written by Professor Bruce, of Northwestern University, formerly Chief Justice of the Supreme Court of North Dakota, is an especially interesting contribution to the literature of American civics, reflecting, as it undoubtedly does, the results of the experience of a scholarly lawyer with the governmental vagaries of North Dakota during the reign of the Non-Partisan League. Only one who has seen the operations of a democracy intent upon brushing aside the restrictions upon its impulsive acts, which the founders of our national government and of our early state institutions believed essential to the preservation of liberty, can fully appreciate the value of these restrictions. The keystone of the arch of the Federal Constitution, as well as of those of many of the States, is an independent judiciary. Judge Bruce's book is not so much a discussion of the American Judge as of the American judicial system. The consideration of the subject opens with a reference to the great importance of the judicial office. As a matter of last resort, he says,

"we are governed by our judges and not by our legislatures; and a supreme-court decision, besides determining the immediate case, lays down and creates the established law and prescribes the rule which shall govern under thousands of similar conditions. It is our judges who formulate our public policies and our basic law. All of our statutes must pass the ordeal of our constitutions and it is the courts that apply the test." pp. 6-8.

These being the facts, the American judge of all public officials is the most important, and should be the most respected and revered, but the author believes the contrary to be the case, and that today in America, the administration of law is in popular disrepute, and the courts in popular disfavor. We venture to doubt whether courts are more subject to popular criticism today than at many other periods in our history. Mr. Charles Warren's History of the Supreme Court of the United States has shown, more clearly than this generation previously had realized, what popular disfavor has been directed against the Supreme Court from time to time throughout its history. It scarcely can be otherwise. The function of courts, to interpose the restrictions of the Constitution between an eager and possibly inflamed electorate and the accomplishment of its immediate object, must frequently arouse popular opposition. The administration of the law ever will suffer from two extremes of criticism, one of being unduly efficient, and the other of failing to meet the requirements of those who demand perfection in the administration of human justice.

The protest against the law's delays and the cost of litigation is as old as civilization. Judges being human, such complaints never are absolutely without foundation. It is doubtful if ever in its history the administration of justice on the whole has been better than at the present time in these United States, and this, despite the fact in certain localities and in respect of certain phases of the administration of justice there is much which may be legitimately criticized.

Judge Bruce adverts naturally to that criticism which is perhaps the most frequently made, and, it may be said, with the least foundation, namely, that our courts have usurped jurisdiction, in refusing to enforce statutes enacted in contravention of our written constitutions. He gives a very succinct and interesting history of this jurisdiction, pointing out how essential it is to the preservation of

the balance between national and state sovereignties that the Federal Supreme Court should test the statutes of States by applying the measure furnished by the federal Constitution itself, in the declaration that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any States to the contrary notwithstanding.

The "indestructible union of indestructible States" would be an impossibility were there no power created to determine when one sovereignty encroached upon the other, and as the Constitution of the United States was made the supreme law of the land, obviously the judicial branch of that government must have the power to assert the supremacy of that law over all others. The federal government being one of limited power, the exercise of federal judicial power necessarily requires the Court to disregard acts of the national legislature unauthorized by the Constitution. The principle is stated in a nutshell by Judge Bruce as follows:

"It would be absurd to contend that when the Federal and later the State judges were required to lift up their right hands and swear to support the constitutions, they were expected afterwards to perjure themselves and to sit idly by and allow those fundamental guaranties to be violated. If, indeed, the day ever comes when a judge will say: 'I am called upon to express my opinion upon this statute and I know that it is unconstitutional; I know, however, that at the present moment it meets with popular favor and that the primary election is near, and, therefore, I will declare it to be constitutional,' then and at that moment free government will vanish from America."

The reference to the primary election leads to a consideration of the real danger which the author points out, in the growing fear of judicial tribunals to exercise their powers. Outside of the Federal judiciary, the uncertain tenure of office of American judges has much to do with delays and uncertainties in the administration of justice, and the selection of judges at the primaries tends to complete the subservience of judicial candidates and officers to popular clamor.

"We will do well to remember that in a democracy there can also be a government by intimidation, and that if we have weaklings on the bench, the fear of removal by a popular vote may be as disastrous to even-handed justice and to the stability of our institutions as the fear of the anger of the King. When, as was recently the case in North Dakota, political factions openly bragged that their candidates for judgeships are pledged to the support of their measures and their political leaders, and newspapers assert that for this reason the election of those candidates is more necessary than that of even the Governor himself, then the lawyer should stop and think and the lawyer should be heard."

We would add that the citizen should stop and think, and should make himself heard upon this subject. How can a judge who is called upon to decide as between the individual citizen and the collective democracy, honestly discharge his function, if he be the cringing tool of the crowd?

The author refers to that paragraph in the Declaration of Independence in which one of the counts of the indictment against George the Third was: "He has made judges dependent upon his will alone for the tenure of their offices and the payment of the amount of their salaries," and suggests that a like dependence upon the Sovereign Democracy is fraught with consequences as destructive of individual liberty as in the case of a monarchy. This condition of independence was met by the framers of the Federal Constitution in the provisions giving to the judiciary life tenure of office and providing that they should be paid by a fixed salary which should not be diminished during their term of office. Such limitation upon the power of the legislative branch of the government is essential to the independence of the judiciary. Without it, there can be no real security of the life, liberty or property of the citizen.

After all, as the author says, the root of the trouble with the administration of justice lies with the people themselves. Their attitude towards the judiciary must determine whether or not the community shall have an upright, efficient and informed judicial system. In the last analysis the judiciary rests upon the bar.

Unless there be an educated competent bar there can be no efficient adequate judiciary.

The law schools have done much to raise the standard of efficiency on the part of lawyers. As Judge Bruce says,

"no reputable law school will graduate a student who in addition to his legal education has not a general culture which is evidenced by a high school diploma or its equivalent, and many schools require a two year or even a four year college course as a prerequisite to their law degree; yet the States of the Union can be counted on one's fingers which require such prerequisites to admission to the bar."

So long as the public authorities and even the courts themselves, under popular pressure, maintain this attitude, just so long will the bar be recruited in large measure by uneducated men of a type who pursue political activities rather than professional success, seek judicial office, and very often secure it.

The author reviews, among other subjects tending towards the unsatisfactory condition of our judicial system, the need of clarifying the law; the excessive cost of litigation; the uncertain tenure of judges, and the effect of judicial primaries and popular elections as methods of recruiting the bench; the objection to technicalities; the use of experts; the effect of arbitration; and the like. We question the soundness of his statement that the complaint of excessive fees and cumbersome methods is especially applicable to the Federal courts, where the clerks, in addition to their fees, have a monopoly of the copying of the records and of the pleadings. In our experience, the cost of litigation in the Federal courts in general is much lower than those in State courts. This is particularly so since the new equity rules which require the testimony of witnesses to be taken in open court, and to a large extent have abolished the old abuse of the taking of testimony before special masters. But both in State and Federal courts the expense of stenography and typewriting is unduly large, and some method should be found to curtail the enormous volume of irrelevant testimony which is recorded and transcribed for the consideration of courts and which adds vastly to the labor of the lawyers and judges in all of our courts.

There is much exaggeration we believe in the common complaint of arbitrary rules of evidence. Judge Bruce shrewdly observes that critics seldom stop to ascertain wherein a technicality really exists and what rules of procedure are necessary and what are not.

"To many the rules against hearsay evidence and mere opinion evidence are the merest absurdities. Yet if they had been present in the courtroom during the notorious Dreyfus trial in France, where no such rules existed or were applied, they would perhaps have wavered in their belief."

The recent Congressional investigations have furnished striking illustrations of the need of rules to protect reputation against statements of hearsay and mere opinion.

Summing up an extremely interesting review of the judicial problem, the author makes a plea for fairness in our criticism.

"Criticize as we may, and as a free people should, the individual decisions of our courts, the costs and delays of judicial procedure and the frequent incoherency of the law, we can at least do homage to the ability and lofty patriotism of the American judiciary. . . . The fact that our heterogeneous peoples have in the past yielded such an implicit obedience to the mandates of the American courts, is in itself the highest monument to the wisdom and to the probity of the American judge. The mandates of our courts have settled boundary lines, they have determined great social and industrial policies, and they have controlled sovereign states. . . . We have obeyed those mandates because in the past the American people have trusted, and in the past have had reason to trust in their judiciary, and have grasped the magnificent concept of the government of a free people made free by law and by law alone."

The book will repay careful reading.

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